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No. 94-1567

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,
Petitioner,

v.

THE YAKIMA INDIAN NATION, THE CONFEDERATED TRIBES AND BANDS OF THE WARM SPRINGS RESERVATION OF OREGON, THE CONFEDERATED TRIBES OF THE UMATILLA RESERVATION, THE NEZ PERCE TRIBE OF IDAHO,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

INTRODUCTION

This is a dispute between the major Indian tribes of the Northwest over the thing most important to them, fishing rights. The United States has taken no position in the case. We respectfully suggest that the Court ask the United States to express its views before deciding whether to take this case.

Regardless of those views, however, this is a case that the Court should take. The case is important. The issue is whether a tribe—having by treaty relinquished its ownership of its aboriginal land in return for certain benefits —*sub silentio* loses those benefits by settling on a reservation different from that contemplated in the treaty. There are many such tribes. No case before this has held, or implied, that such action destroyed rights guaranteed by treaty, thus destroying the consideration for the tribe's relinquishment of its land. The ruling of the Court of Appeals is thus both unprecedented, and destructive of promises made by the United States.

The respondents argue that the case turns on complex factual issues. That is not so. The factual issues have been resolved. A legal issue remains. The Court of Appeals held that each of petitioner's constituent treaty tribes had maintained its "identifiable cultural and political characteristics", which allowed "their recognition as constituent tribes of the Colville Confederacy". Pet. at 8a. Moreover, there was no dispute that each tribe was party to a treaty that reserved its fishing rights. Pet. at 60a. Thus the only issue left was the legal issue of whether by not settling on the reservations established in their treaties (and moving closer to their reserved fishing areas), the treaty tribes lost part of the *quid pro quo* under the treaties, the right to fish at their usual and accustomed places. It is clear from the Court of Appeals decision that only that issue guided its decision. Pet. at 10a.

The Court of Appeals has established a rule of law that has never before been applied, that abrogates decades of federal practice, that is contrary to the recognition of the fishing rights of similarly situated tribes (*see* Pet. at pp. 5-7), that takes away the *quid pro quo* for relinguishment of lands by the tribes (and thus exposes the United States to substantial liability), that is inconsistent with the holding of the Court of Claims in a suit between the same tribes, and is plainly wrong.

ARGUMENT

The opposing tribes [1] wish the Court to ignore that no court has ever embraced the rule of law that the failure by a tribe to move to a particular reservation can provide a basis for the loss of treaty rights.[2] Where a decision of a lower court is inconsistent with long established federal policy dealing with Indian affairs it is appropriate for this Court to grant review. *Morton v. Ruiz*, 415 U.S. 199, 201-02, 212-30 (1974) (decision below "inconsistent with long-established policy of the Secretary [of Interior] and of the Bureau [of Indian Affairs]").

In gauging the importance of the question presented, this Court should consider the power exercised by the United States over the treaty tribes during their movement to the Colville Reservation and the trust responsibility of the United States. *See United States v. Creek Nation*, 295 U.S. 103, 109-10 (1935). It was the United States that allowed or forced the treaty tribes to go to the Colville Reservation. It was the United States that assured the treaty tribes that moving to the Colville Reservation and confederation into the Colville Tribes would *not* affect their treaty rights. It was the United States that urged the confederation and later recognized each of the treaty tribes as a constituent member of the Colville Tribes. Now, the United States' courts hold that the tribes in listening to the United States lost their treaty rights.[3] This decision could not be more wrong.

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[1] Only the Warm Springs, Nez Perce and Yakima tribes ("opposing tribes") opposed the Colville Tribes. The states of Oregon, Washington and Idaho and the Umatilla and Shoshone Bannock tribes did not.

[2] The Court of Appeals' attempt to moderate the impact of its decision through its amended order (Pet. at 13a) cannot detract from the fact that no other basis for affirming the District Court is put forward by the Court of Appeals except for the failure of the treaty tribes to move to and confederate on those reservations identified in their treaties. *See* Pet. at 10a.

[3] Contrary to the assertion of the Nez Perce tribe (brief at 9), *United States v. Washington*, 641 F.2d 1368 (9th Cir. 1981), *cert.*

The rule developed by the Court of Appeals abrogates the promises made by the United States and diminishes the tribes' status in the federal system. Where, as here, a "doubtful determination" of an important question of Indian law is presented, review by this Court is appropriate. *Williams v. Lee*, 358 U.S. 217, 218 (1959).

The Court should also examine the shifting rationale used by the lower courts to deprive the treaty tribes of their treaty fishing rights. The *District Court* concluded that by merging into the Colville Tribes the treaty rights were lost. This rationale was rejected by the Court of Appeals. Pet. at 10a. Rather, the Court of Appeals, in an initial and then a revised opinion, created a new rationale: the failure to confederate on the reservation originally established for the tribes in their treaties abrogates their treaty rights. *Id.* These shifts do not reflect a thoughtful deliberation of the important issue of how treaty status is established and preserved over time. In a case of such importance regarding the status of Indian tribes, review is appropriate.

The opposing tribes deny the wide impact of the Court of Appeals decision. But it will likely impact all fishing rights cases. For instance, it will impact the law in *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976) because that case is one of continuing jurisdiction. A court with continuing jurisdiction has the power to reconsider its prior decision at any time. *Messinger v. Anderson*, 225 U.S. 436, 443-45 (1912). A clear change in the law may well compel a lower court with continuing jurisdiction to reconsider its previous and now inconsistent rulings. 1B *Moore's Federal Practice*,

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denied, 454 U.S. 1132 (1982), the unrecognized tribe case, does not address the issue before the Court. That case concerned five tribes never recognized by the United States in any treaty or other action.

¶ 0.404[1] (2d ed. 1995). In addition, numerous other modern federally recognized Indian tribes are configured like the Colville Tribes; confederations of several tribes brought together by historical necessity or the United States. These tribes will be impacted by the Court of Appeals decision.

Finally, the Court should consider the potential of United States liability should the decision of the Court of Appeals be allowed to stand. *See, e.g., United States v. Mitchell*, 463 U.S. 206, 211 n.7 (1983) (the potential of substantial United States liability is a basis for granting review by the Supreme Court). The Court of Appeals' decision abrogates rights which vested in 1855 when the tribes gave up their land in return for other rights including fishing rights. The uncompensated taking of those fishing rights opens the United States to a Fifth Amendment claim. *See Menominee Tribe v. United States*, 391 U.S. 404, 407, 413 (1968).

The Yakima Tribe[4] reminds the Court of the unusual role of the United States in this proceeding. Yakima Brief at 13. The Colville Tribes suggest that this Court pay particular attention to how the United States has approached this case. In 1968, the United States incorrectly advised the District Court that no additional tribes had treaty rights in the case area. *United States v. Oregon*, 302 F. Supp. 899, 904 (D.Or. 1969). The Shoshone Bannock Tribe was later granted the right to intervene in *United States v. Oregon* because it had treaty fishing rights.

The United States' failure in 1968 to name the Colville Tribes is explained because at that time the United

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[4] It bears repeating that the holding of the Court of Appeals finds the fishing rights in question residing in a tribe (Yakima Nation) that never came into existence, Pet. at 21. The Yakima Tribe opposing the Colville Tribes here is, like the Colville Tribes, a modern federally recognized tribe composed of the tribes that moved to its reservation.

States was in the process of trying to terminate the Colville Tribes. The Colville Tribes did not fully overcome the effort to terminate until after the 1969 ruling. In 1968, the United States would have had no interest in asserting rights on behalf of a tribe that was about to be terminated.

The United States took the unusual step in this proceeding of allowing the tribes to wage the battle of treaty status as between themselves. The United States took no position against the Colville Tribes assuming, one would suppose, the fight would be fought within the confines of existing law. Of course, no one anticipated that the Court of Appeals would create a new and substantially different standard upon which to base a determination of treaty status in a proceeding where the United States was silent.

Finally, the Yakima Tribe seeks to diminish both the relevance and the importance of the Court of Claims decision in *The Confederated Tribes of the Colville Reservation v. The Yakima Tribes of Indians of the Yakima Reservation,* 204 Ct. Cl. 868, *cert. denied,* 419 U.S. 967 (1974) ("Claims Case"). But, it is clear that the Claims Case held the Colville Tribes are the modern Indian political entity that represents the aboriginal Chelan, Columbia, Wenatchi, Entiat and Palus tribes. *Id.* at 870. All the opposing tribes accept the fact that the only issue before the courts below was the treaty status of the Colville Tribes. *See* Nez Perce Brief at 5-6 (joined in by the Yakima. *See* Yakima Brief at 4-6). That is the exact issue resolved by the Court of Claims in 1974 and is binding in this case. There is no basis to require the Colville Tribes to litigate their treaty status again in this proceeding.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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